was however specifically rejected by their Lordships of the Privy Council in *Ramdin* v. *Kalka Pershad.*[6] In that action, the lender sought to enforce a mortgage and prayed that the principal and interest might be enforced against the mortgaged property and also by rendering the person of the borrower and his other property liable on the ground that the mortgagor pledged not only fixed immoveable property but also his personal bond. Their Lordships held that since ten years had elapsed, the mortgagee's remedy against the person of the mortgagor was barred but his right remained to enforce his demand against the mortgaged property.

Facts identical to those in the case under appeal existed in *Barclays Bank Ltd.* v. *Beck & Anor.*[7] The issue there was not limitation but was merger of the causes of action. There the defendants had similarly executed a charge to secure an increased overdraft, and they claimed that after they had paid off the charge, they were no longer liable for the excess of the overdraft over the agreed amount of the charge. They contended that the simple contract debt had been merged in the charge. Their contention was rejected, just as the contention in this case made as a corollary should be. Because the claim on the charge was not barred, it did not mean that the claim on a simple debt made more than three years after it had become due, was similarly not barred.

In his judgment in that case, Denning L.J. said at pages 552-3:

"When security is given for payment of amounts due or to become due on a running account, the doctrine of merger, if it applies at all, would at the most only apply to the indebtedness which existed at the date when the convenant was taken and the charge given. Future debts do not merge; they take their colour from the circumstances in which they arise. They are then either specialty debts or simple contract debts, and, as they start, so they go on... a future debt on a running account is a debt created by parol and it remains a simple contract debt even though the customer has previously given a charge to secure it.... The future debt on running account is not created under the deed. It may be that it would never have been created but for the deed, but that is a different thing. It only means that the deed is collateral security for its repayment.... Where this collateral security was discharged and handed over, the indebtedness on simple contract remains except in so far as it had been satisfied by payment."

We would add to the last sentence, or except in so far as the defence of limitation succeeds.

Both Denning L.J. and Somervell L.J. relied on the Privy Council *dictum* in *Stamps Commissioner* v. *Hope*[8] that

"The reported language of the court in some places indeed seems to imply a larger and broader meaning; but, if that is to be understood as importing that a merger of a simple contract debt in a debt of a higher nature is effected by law, merely by the existence of an identical covenant and notwithstanding the plain intention of the parties to the contrary, that is a proposition which their Lordships would hesitate to assent to."

In our view therefore, there is sufficient authority to hold that the Bank, in its own turn, cannot claim that the simple contract debt of an overdraft is merged into the charge and so far as limitation is concerned, covered by Article 101 and not by Article 40.

Counsel for the respondents referred to two more Articles in the Schedule to the Limitation Ordinance. He did not rely on them in the court below. He now said that the defence of limitation could be defeated by the provisions of Article 94 or 97. Both provide for a period of 6 years and if time ran from November 4, 1974, then the Bank's action would not be statute-barred. Article 94 refers to an action for compensation for the breach of a contract in writing and Article 97 to a suit for which no period of limitation is provided elsewhere in the Schedule. The short answers are: the Bank's action is not for compensation for the breach of a contract in writing and a period of limitation is provided in Article 40 for a claim for money lent.

The appeal was for these reasons allowed with costs, both here and in the court below. It should be clear however that nothing in this judgment decides that the charge is barred by limitation.

Appeal allowed.

Solicitors: *Ee & Lim; Chan, Jugah, Wan Ullok & Co.*

SEBAYA SDN. BHD. v. SYARIKAT BEKERJASAMA LADANG KELAPA SAWIT PEGAWAI-PEGAWAI NEGERI PAHANG BERHAD

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Ibrahim Manan F.JJ.) October 8-10 & December 27, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1978]

Practice and Procedure — Action by Co-operative Society against managers of their oil palm plantation — Action for dismissal of managers — Application for interlocutory order for payment into court of proceeds of sale of oil palm — Order for payment into court made by court.

In this case the respondents, a co-operative society, which owned an oil-palm plantation had appointed the appellants as managers but had not got a cent from it. They served notice of dismissal and took action against the appellants. They then asked for an interlocutory order for the payment into court of the proceeds of the sale of oil palm fruits harvested from the land. The learned trial judge ordered the appellants to pay $1,000,000 into court within thirty days and the sum of $50,000 on the 1st day of each month commencing from July 1, 1978 and that upon failure to pay the sum of $1,000,000 into court as ordered they were to vacate the estate. The appellants appealed and applied for stay. Stay was allowed for the payment of $1,000,000 but not of the $50,000 monthly. The appeal was then heard by the Federal Court.

Held: on the evidence in this case the sum likely to be due to the respondents was sufficiently ascertained and the High Court had jurisdiction to make the order and had exercised its jurisdiction properly in making the order.

Cases referred to:-

(1) *London Syndicate* v. *Lord* 8 Ch. D. 84.

(2) *Wanklyn* v. *Wilson* (1887) 35 Ch. D. 180.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse for the appellant.

Chin Yew Meng for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): A planted and matured oil palm plantation of some 3,000 acres in production (though not all of it) from October 1974 and not a cent from it.

That was the basic fact prompting the respondents, the plantation owners (the Co-operative), after some delay to serve notice of dismissal on the managers of the plantation and when the latter insisted on staying over, again after some further delay, to take action against them, by writ issued in 1976.

In an application made on December 9, 1976, the Co-operative asked for an interlocutory order that "all net proceeds from the sale of oil palm fruits harvested from the plaintiff's land, hitherto received by the first defendant and estimated at $1,667,000 and the net proceeds from the sale of such fruits received by the first defendant on or after the 1st day of December 1976 and estimated at $83,350 per month, without prejudice to the rights of the parties in this action, be paid into court to abide the event in this action."

This application came on for hearing in open court on May 12, 1978 and was continued on May 23, 25 and 29. The length of the hearing was due to the severe cross-examination of the deponents on the several affidavits filed in support of and in opposition to the application, but the learned judge had no hesitation at the end of the evidence and submissions in ordering that the managers pay the sum of $1,000,000 into court within 30 days and the sum of $50,000 on the first day of each month commencing from July 1, 1978 and that upon failure to pay the sum of $1,000,000 into court as ordered within the time stipulated, the managers were to vacate the estate. An application for stay was refused.

The managers promptly enough filed a notice of appeal. They did not pay in the $1,000,000 as ordered within the time stipulated or at all. They applied to this court for a stay pending the hearing of the appeal. A stay was allowed for the payment of the $1,000,000 but not of the $50,000 monthly. Thereafter, they produced every month with commendable promptitude and efficiency this not inconsiderable sum of $50,000 for payment into court. And the matter lay in the normal process of appeal, awaiting the compilation of the record of appeal and the grounds of decision of the judge.

The Co-operative did not appeal from the determination of the quantum of $1,000,000 or the amount of the monthly payment though they were less than what they had asked for but it came to the realisation that the $50,000 was much too low a figure. They had the idea that every month, the managers derived much more than that sum by way of net returns from the plantation, and they thought that the monthly payment should be as in the original application, $80,000. But since it had not cross-appealed and since it could not await the outcome of the appeal, it made an application to this court for a variation of the order of this court refusing a stay for the payment of $50,000 monthly.

We heard that application on September 19, 1979. As to be expected, it was strenuously opposed by the managers. Their counsel argued with some persuasion that this court possessed no powers to make variations of an order appealed from in an interlocutory application and pending the outcome of the appeal. We saw the force of this argument but we also realised the urgency of the matter. We therefore ordered the appeal to be brought on for hearing on October 10, 1979 without waiting for the judge's grounds of decision. We however caused a copy to be made of the judge's notes of evidence taken by him at the hearing of the application. Those notes were before us and before counsel at the appeal.

At the hearing we confirmed the order of the judge. We now give our reasons in writing for believing the judge to be right.

But in order to understand our reasons, it is necessary to advert to more facts than have been given so far.

The Co-operative was given a tract of 55,000 acres in extent of virgin jungle which it had to clear for replanting. It entered into an agreement with the managers, therein described as consultants, for a feasibility study and report on the possibility of developing the land as an oil palm estate, for assistance in procuring financial assistance at a remuneration and subject thereto, it agreed to appoint them as development agents for the various stages, first of clearing the jungle and of selling the timber thereby produced, then of planting the area with oil-palms and after these stages, to appoint them as management agents to manage the oil-palm estate.

It is provided that "it shall be the special duty of the consultants or development agents to exercise all reasonable care in the expenditure of funds keeping it to the lowest possible minimum and in the execution of each and all the works to the generally accepted standard of quality within a reasonable time consistent with the technique or method available."

Some 15,000 acres of forest were cleared and planting with oil palms commenced in 1971. In that year, a total of 2,480 acres was achieved. In 1972, a further 520 acres were planted while 1973 saw 61 acres being planted, making in all a total of 3,061 acres (see page 2 of Tunku Mansur Yaacob's report of his visit in June 1974 as visiting agent, made at the request of the managers, at page 178 of the Record). Elephants, according to Tunku Mansur Yaacob, caused damage to 110 acres. There is a dispute as to the acreage in actual production. The managers maintained it was only 1,500, the other acres being damaged by elephants. It was also the visiting agent's conclusion development costs to date had been very low.

From his compilation, towards the end of his report of "Basic assumptions on costs and returns per acre of oil palm" (see page 196 Record), Tunku Mansur Yaacob was of the opinion that an oil palm estate would come into production four years after planting. In that year which he labelled as 3, he would expect a minus return of $52 per acre, but from the fifth year and subsequent years, he anticipated a potential return of $169, $317 and $450 up to the 8th year of planting. We should not be bothered by arithmetic but it is nevertheless useful to note that in 1977 which would be the 6th year of planting and taking round numbers, an estate of 3,000 acres with a net potential return of $380 per year would derive a net profit of $1,140,000 giving a month's

average of about $100,000. If only 1,500 acres were in actual production, then the monthly income would be $50,000. And yet, the Co-operative did not receive a single cent.

But compare this report with another, that of a Mr. J.R. Leach also made at the request of the managers, in October 1977. He too found a planted area of 3,012 acres, of which 207 acres were completely destroyed by elephants, 646 acres suffered severe damage while 824 acres were only moderately damaged and the rest of 1,335 acres had "slight to nil" damage. His advice was that an oil palm is a very hardy growth and unless completely destroyed, would soon recover and bear fruits. In his concluding summary of total expenditure and proceeds received, he calculated that the proceeds for the first seven months were $683,697.82. If it is assumed that his figures were net, and it is noted that he accepted production from 1,539 acres, his monthly average of $97,000 approximately was about twice the estimation of Tunku Mansur Yaacob. And perhaps it is worth repeating that the managers had not a single dollar to give the Co-operative.

Yet, despite this trend of profitability found by Mr. Leach on figures supplied to him by them, the managers claimed for the ensuing period of 5 months, from October 1977 to February 1978 (see page 244 of the Record) an expenditure of $543,802.78 made up of agricultural, administrative and capital accounts, to which they added an agency fee of 10%, that is, the sum of $54,380.28 so that against a sale of 2,972,417 tonnes for $399,706.73 they had incurred for the Co-operative a net loss of $199,476.33.

At this stage, it is to be observed that the charge of 10% of the operating costs as fees for this management and post-development period is, so far as we can understand for ourselves, not based on any provisions of the agreement in clause (iv) thereof.

It remains to be remarked that such accounts as were rendered by the managers were entirely unsatisfactory. As managers for the Co-operative with the duty to regulate expenditure and to receive the proceeds of sales, it should have been a fundamental obligation for them to render periodic accounts properly supported by vouchers, bank balances, etc. and properly audited and submitted at the proper times to the Co-operative for acceptance or challenge. This task should have been that much easier if there is any truth in the advice given by Mr. Chin himself that Sebaya was incorporated solely for the purpose of developing and managing this particular plantation and had no other reason for existence. We see no evidence from anywhere in the Record and we have no advice from the Bar that this had been done. Such accounts as the managers deigned to submit to the court (Exhibit D10 and D11 from pages 242-249) were mere summaries of sales and expenditures not shown to be abstracted from any audited accounts previously submitted to the Co-operative. Apart from any question of any confidence that could reasonably and reliably be placed on figures of such a nature, the statement of loss obviously but unaccountably is at variance with the estimate of Tunku Mansur Yaacob and what is more significant, with the finding of Mr. J.R. Leach of actual plus proceeds. A general trend of profitability was suddenly and without any explanation at all reversed into a loss.

In the circumstances of this case, the managers resisted their dismissal. And we heard Mr. Y.M. Chin, their counsel stressing on more than one occasion that his clients considered the dismissal and the interlocutory order serious reflections on their good name which they want to see preserved. In the first place they said that not all 3,000 acres had been or could be harvested. Only 1,500 acres were. The other half was damaged by elephants. The implication was that the damage was so severe that this half could not be harvested at all. Neither of the visiting agents found this to be the truth. Mr. Leach found only 207 acres destroyed. He also found some discrepancies in the figures provided him during his visit. Why there should be discrepancies had not been explained to him or to this court. But on the figures given to him, he made a proportionate adjustment of crop statement figures to agree with actual crop to date. The results showed an area of 1,599 acres harvested. But it is clear that the accuracy of his figures depended in the first place on the truth or correctness of the actual crop harvested and for this, he was entirely dependent on the advice given to him.

Next, the managers said that there was no money for fertilisers and this resulted in a poor yield. Mr. Leach again provided the answer to this. He found that manuring had been followed in accordance, but perhaps not fully, with the recommendations of agronomists but in his considered opinion "manuring is considered of relatively low priority if funds are short and is not economically justifiable in areas that are not fully harvested. The estate was planted in virgin soil and there should be no need to manure palms which have produced less (?) than 6 tons FFB per acre, unless there are visual foliar symptoms of nutrient deficiency."

It is however to be observed from the reports of the visiting agents that not all the fruits, for one reason or other, had been harvested. In this appeal we are not concerned with the reasons for this failure to reap the full benefit of the labour and money expended on this project, but giving full consideration to every contention of the managers and in all the circumstances adduced in the affidavits and in evidence we are unable to understand why until the order of the High Court was made, they had not been able to produce a monthly income or a yearly profit, or why after it, they could produce the not inconsiderable sum of $50,000 every month.

Neither could the Co-operative. Up to 1974, it had been most complacent about it all. It had been content to let the managers manage the estate and not to require any returns. Then there was a change of management and with the change came dissatisfaction, which one would have thought was not unreasonable. The new management considered the previous complacency suspicious and they alleged that the previous chairman and another director of the Board of the Co-operative were responsible with a senior Government official for the appointment of the managers to this project and that these three persons had expectations from the managers. For this reason, it joined them in the action. We are at this stage

not concerned with the part alleged to be played by them or the effect on the appointment, if the allegations were proved. We are only concerned with the order that was made.

This order was predicated on the views taken by the Co-operative on facts and figures, such as they were, submitted by the managers. It took the average production per acre at the relevant stage of growth and the average price per ton. It also allowed 50% of the proceeds of sale for the expenditure incurred in the production and it also took into account the capital expenditure claimed by the managers. On an area of 2,300 acres for the period from September 1974 to August 1975, and thereafter on an area of 2,500 acres, it calculated that the net income for this period was $2,420,466. But if the expenditure was not half the proceeds but somewhat less, as would appear to be claimed by the managers in their summaries of their accounts, then the money in their hands would be $2,854,310. Alternatively, taking Tunku Mansur Yaacob's figures of net income and deducting from this net income the captial expenditure as claimed by the managers, it worked out a figure of $2,432,500 as being with the managers. Finally, on the basis of an acreage of 1,500 as being under production from September 1974 (compare the figure of 1,599 arrived at by Mr. Leach after an attempt at reconciliation with production), and the other factors, the Co-operative demonstrated that the net income would be $1,376,300. This was the view most favourable to the managers and quite obviously, the judge accepted this as being reasonably accurate and clearly based on the figures supplied by the managers. He therefore made the order that the managers pay the sum of $1,000,000 into court. If he erred at all, he would appear to have erred on the side of the managers.

The managers' appeal was almost entirely directed to this part of the order and the consequences that would follow from their failure to comply therewith. As we heard their counsel, they did not resist the order to make the monthly payment of $50,000. At the hearing in the High Court, they did not produce the best evidence available. They produced uncorroborated abstracts of accounts which did not tally with the reasonable deductions to be drawn from the facts and figures given by their visiting agents. And, when it came to the crunch, they said, completely forgetting that they had charge of the accounts and the money: You must first establish your right and then we will pay, but only what you can establish as being in our possession. Until and unless you can point your finger to the exact amount, we are under no obligation whatsoever to pay money at all.

Perhaps, it is only reasonable to infer that there is no money in their banking accounts. Certainly not a million dollars. But foolish virgins have been known to burn and waste away the oil which their wiser sisters saved. And if at the proper time, they could not produce the goods, they must face the consequences, more so if they have to render an accounting afterwards.

We trust the right of the Co-operative to the net profits from the oil palm plantation is not a matter of dispute. Nor the inherent duty of the courts to do justice.

As for the alleged onus on the Co-operative to identify with certainty the money in the hands of the managers, Sir George Jessel M.R. in *London Syndicate* v. *Lord*[1] at pages 88-89 said that all that was required was whether under the circumstances it had been sufficiently ascertained, there was a sufficient probability that the account would result in the balance of the amount at least being due by the defendant to the plaintiff.

In *Wanklyn* v. *Wilson*,[2] a case of an interlocutory application for the payment of money into court made before the trial of an action for the taking of the account, Stirling J. concluded at page 185, after a review of the relevant cases that

> "Upon these authorities it seems to me that the court is now at liberty, when it has before it the parties to an account, to look at the account and the facts of the case, and, to use the words of the late Master of the Rolls, 'in the fair exercise of its judicial discretion', to order a sum of money to be paid into court when it has been sufficiently ascertained that such a sum will be due on the taking of the account. Adopting that principle, I have to look at the facts of this case, and in the fair exercise of my judicial discretion I have to consider whether I can arrive at any conclusion as to what sum will be due to the plaintiff in the taking of the account which is the object of the action, having regard to the account which has been actually rendered by the defendant in the action; and I am also to bear in mind that the object of the whole proceeding is, again quoting the words of the late Master of the Rolls (8 Ch.D. 90), 'to secure the fruits of that litigation to the successful party, and nothing can more conduce to attaining that object than taking security from the person who must ultimately pay at least the amount for which security is given'."

In our view and with respect, the High Court had, in the circumstances of this case, jurisdiction to make the order and had exercised its jurisdiction properly in making the order. For these reasons, the appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *Rithaudeen & Aziz; Allen & Gledhill.*

K.C. LIM & ASSOCIATES SDN. v. PEMBENAAN UDARAMA SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) November 5, 1979 & January 8, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 128 of 1979]

Practice and Procedure — Claim by architect for fees — Project abandoned by developer — Whether costs of construction grossly underestimated — Application for summary judgment — No triable issue — R.S.C. 1957, O. 14.

Architects — Fees — Agreement for fees — Project abandoned — Whether costs of construction grossly underestimated — Implied condition.

Contract — Architect — Agreement for fees — Negligence or want of skill — Implied term.

In this case the appellants were instructed to prepare a preliminary design and to provide a feasibility study report and cost plans for a multi-purpose shopping and commercial complex and high-rise residential flats for the respondents. The appellants employed a firm of Chartered Surveyors to provide the feasibility study. Plans were then submitted by the appellants to the City Council. Subsequently the respondents informed the appellants that they had decided to abandon their project after a reappraisal of the feasibility and viability of the project. The appellants thereupon sued under the contract of appointment for the fees for the stages they had completed in accordance with the contract, amounting to a total of $1,682, 216.16. The defence raised by the